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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ATOMIC COMPANY,
Appellant,

v.

UNITED NUCLEAR CORPORATION

and

INDIANA & MICHIGAN ELECTRIC COMPANY,
Appellees.

On Appeal from the Supreme Court of New Mexico

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Under constitutional doctrines of act of state and exclusive federal control over foreign policy, as well as principles of international comity, all of which restrict the exercise of subject matter jurisdiction by state courts where the foreign affairs of the United States are affected,

(A) May a state court take jurisdiction to apply state law to a foreign nation's regulation of its vital natural resources, and do so over the official protests of that nation and in complete disregard of the nation's official representations of its own law and policy?

(B) May a state court thereafter default a party for failure to produce foreign documents whose disclosure is forbidden by the foreign nation's criminal law enacted specifically to preclude inquiry into that nation's regulatory program by American tribunals?

2. May a state court retain jurisdiction to proceed to judgment by unconstitutionally enjoining a defendant from exercising its federally guaranteed right of access to another tribunal?

3. May a court, consistent with due process,

(A) Enter a default judgment for inability to produce documents held confidential by a foreign government, without determining at trial the extent, if any, to which the plaintiff was disadvantaged on particular issues?

(B) Enter a default judgment encompassing issues as to which the unobtainable foreign documents could have no conceivable relevance?

(C) Enter a default judgment because of alleged bad faith in discovery without granting a requested evidentiary hearing on that issue, and thereby strip a party of rights worth hundreds of millions of dollars despite the reviewing court's concession that the documents in question could not possibly have been obtained?

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Appellees.

On Appeal from the Supreme Court of New Mexico

JURISDICTIONAL STATEMENT

General Atomic Company ("General Atomic")[1] appeals from a final judgment of the Supreme Court of New Mexico.

OPINIONS BELOW

The opinion of the New Mexico Supreme Court affirming the trial court's final judgment of default is reproduced at Appendix A and reported at 1980-81 Trade Cas. (CCH) ¶ 63,639 (N.M. 1980). The opinion of the trial court upon entry of the default is reproduced at Appendix C and is unreported. The New Mexico Supreme Court opinion on appeal regarding General Atomic's arbitration rights is reproduced at Appendix B and reported at 93 N.M. 105, 597 P.2d 290 (1979). The opinion of the trial court upon this question is reproduced at Appendix J and is unreported.

[1] General Atomic is a partnership owned by Gulf Oil Corporation and Scallop Nuclear, Inc., which is itself a subsidiary of the Royal Dutch Shell Group.

JURISDICTION

The judgment of the Supreme Court of New Mexico upholding the trial court's default judgment was entered on August 29, 1980, and an order denying rehearing was issued by the New Mexico Supreme Court on October 23, 1980. (App. P.)[2] A Notice of Appeal was filed January 7, 1981 in the New Mexico Supreme Court (App. Z.) Upon timely application, Justice Byron White granted appellant an extension of time until February 11, 1981 to docket an appeal or, in the alternative, to file a petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2), which provides for review by appeal. An appeal lies because General Atomic drew in question the validity as applied of a state statute (the New Mexico Antitrust Act) and a state discovery rule (Rule 37 of the New Mexico Rules of Civil Procedure) as being repugnant to the Constitution and laws of the United States, and the decision below was in favor of their validity. Should the Court conclude that this case is not reviewable by appeal, General Atomic asks that this paper be treated as a petition for a writ of certiorari, in which case this Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution are involved in this case: Article I, Section 8, Clause 3; Article II, Section 2, Clause 2; Article VI, Clause 2; Amendment XIV.

The following statutes, regulations, and rules are involved in this case: The Federal Arbitration Act, 9 U.S.C. §§ 2, 3 (1976); the Canadian Uranium Informa-

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[2] References to the separately bound Appendix accompanying this Jurisdictional Statement are cited, *e.g.*, (App. B 235a); references to the Constitutional and Statutory Appendix at the end of this Jurisdictional Statement are cited, *e.g.*, (Const. & Stat. App. A-1); other references, *e.g.*, (R. 10162) (Tr. 5/35), are to the record below and are in the form previously used by the parties.

tion Security Regulations § 3, SOR/76-644, as amended by SOR/77-836, promulgated pursuant to Section 9 of the Atomic Energy Control Act, R.S.C. 1970, c. A-19; the New Mexico Antitrust Act, §§ 49-1-1 to 49-1-3 N.M.S.A. (1953) (revised in 1979); Rule 37 of the New Mexico Rules of Civil Procedure (1978) (amended in 1979).

The foregoing provisions of law are set forth in the Constitutional and Statutory Appendix to this Jurisdictional Statement.

RAISING THE FEDERAL QUESTIONS

Appellant's federal questions were timely and properly raised in the New Mexico courts as follows: (1) General Atomic challenged the New Mexico trial court's exercise of jurisdiction on the grounds of the doctrines of act of state and exclusive federal power over foreign affairs by raising these grounds in its motion for partial summary judgment and its motion to dismiss the antitrust claims (R. 14297-391, 18196-227, 18370-400), as well as in a motion to stay the proceedings filed in the New Mexico Supreme Court on January 26, 1978. The New Mexico Supreme Court affirmed the trial court's rejection of these arguments (App. A 46a-73a); (2) General Atomic challenged the entry of the default judgment as a denial of due process because a requested evidentiary hearing on alleged bad faith in discovery was denied, the court did not determine whether the parties seeking discovery had suffered any prejudice, and the judgment was overbroad. Those challenges were raised in General Atomic's opposition to that default (R. 20073-79), its requests for an evidentiary hearing (R. 19347-48, 20187-91), and its request for reconsideration of the default (R. 20819-824). The New Mexico Supreme Court affirmed the trial court's rejection of these arguments (App. A 165a-179a); (3) The trial court retained jurisdiction by issuing unconstitutional injunctions against the exercise of federally guaranteed rights of arbitration. General Atomic challenged

the retention of subject matter jurisdiction. (Supplemental Brief, filed June 30, 1978.) The Supreme Court of New Mexico ignored the challenge in its opinion of May 7, 1979. (App. B.)

STATEMENT OF THE CASE

This is an appeal from a final judgment of the Supreme Court of New Mexico. That court upheld a default judgment entered because of appellant General Atomic's inability to produce documents that could not be obtained without violating Canada's criminal law. The resulting default judgment is by far the largest in American legal history, worth between 500 million and one billion dollars, depending upon fluctuations in the price of uranium.

The unobtainable documents, located in Canada, concerned that nation's regulation of its uranium industry. Canada made repeated official representations to the New Mexico courts concerning its regulation, but these were rejected or ignored. Appellant was caught between Canada's regulation of its uranium industry and New Mexico's refusal to hear or accept Canada's official representations about that regulation.

The judgment rested upon the New Mexico court's assumption of jurisdiction to inquire into and judge the legality of a multi-nation marketing arrangement entered into by Canada as a governmental regulatory action. The trial court was able to retain jurisdiction only by issuing two injunctions, both summarily reversed by this Court, which illegally prevented General Atomic from exercising its right to arbitration for a period of 26 months. Finally, the default judgment, which abruptly terminated the trial of issues over which jurisdiction had been unlawfully assumed and retained, was entered in a manner totally inconsistent with the requirements of due process as defined by this Court.

The dispute between General Atomic and appellees United Nuclear Corporation ("United") and Indiana and

Michigan Electric Company ("I&M") is one of five major proceedings which constitute the Uranium Cases.[3] These cases all present as a central issue the jurisdiction of American courts to inquire into and judge the legality of the foreign uranium "cartel"—a marketing arrangement required and supervised by the governments of Canada, France, South Africa, and Australia.

The four uranium producing nations, in accordance with procedures established by this Court, have made extensive official representations to American courts concerning their individual and collective regulation of uranium prices and terms of sale. The producing nations and the United Kingdom have also made representations concerning the assumption and exercise of jurisdiction by those courts.[4] The foreign governments' representations have been rejected, ignored, and misrepresented by American courts. When the New Mexico Supreme Court refused to accept Canada's official representations about its owr regulation, it assumed the power to inquire into and judge that regulation.

Marketing arrangements between nations attempting to control the price of their vital national resources are a commonplace of today's world. If American businesses cannot obey such regulations in foreign countries, they will often be unable to do business abroad. If state and federal courts assume the unprecedented power to examine and judge such foreign governmental acts, those courts will step across constitutional barriers to intrude

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[3] The others are *In re Uranium Antitrust Litigation, Westinghouse Electric Corp.* v. *Rio Algom, Ltd.*, MDL No. 342 (N.D. Ill. filed October 15, 1976); *In re Tennessee Valley Authority Uranium Antitrust Litigation*, No. 342A (N.D. Ill. filed November 18, 1977); *General Atomic Co.* v. *Exxon Nuclear Co.*, No. 78-223-E (S.D. Cal. filed April 7, 1978); *Reserve Oil & Minerals Corp.* v. *General Atomic Co.*, No. 77-592JB (D.N.M. filed September 22, 1977). All the Uranium Cases together involve claims worth several billion dollars.

[4] Each nation has adopted or strengthened laws to block the production in the United States of documents relating to its regulation of uranium export prices and terms, including the member nations' roles in the collective marketing arrangement.

upon American foreign policy. Indeed, this and the other Uranium Cases have already adversely affected the foreign relations of the United States.

Because the continuation of such judicial action will continue to exacerbate foreign relations, interlocutory review by this Court will shortly be sought in the remaining Uranium Cases.

A. The Commercial Background

Between 1966 and 1971, United entered into five long-term agreements with four utilities, including I&M, to deliver approximately 29 million pounds of uranium between 1968 and 1986. The contract price was the market price at the time of each agreement. In mid-1971, United, needing additional capital, entered a joint venture with Gulf Oil Corporation ("Gulf"). The new corporation, Gulf United Nuclear Fuels Corporation ("GUNF"), was assigned the five contracts United had signed with utilities and assumed responsibility for performing them. United agreed to supply GUNF with the uranium it had previously committed to the utilities.

GUNF did not prosper, and in 1973 Gulf agreed to United's proposal to buy out United's interest. United recommitted itself to supply GUNF with uranium needed to carry out the utility contracts. This 1973 supply agreement and the obligation to perform United's utility agreements were later assigned by GUNF to Gulf and from the latter to General Atomic. In a 1974 supply agreement, United sold an additional three million pounds of uranium to General Atomic through a broker.

B. The Beginning of This Litigation

Between 1973 and 1975 the open market price of uranium rose sharply, and some suppliers attempted to escape their contracts. United, wishing to sell at the market rather than the contract prices, filed suit against General Atomic on December 31, 1975, in a state district court in Santa Fe, New Mexico. United sought a declaratory judgment invalidating the 1973 supply agree-

ment. On April 5, 1976, United filed an amended complaint identical to the first except that it sought to invalidate the 1974 supply agreement as well. Subsequently, on January 21, 1977, I&M was joined as a party. General Atomic has taken the position throughout this litigation that, if its contracts with United were upheld, it would honor its contract with I&M.

United filed a "speaking complaint" alleging facts and legal theories in great detail. The legal theories set out were fraud, breach of fiduciary duty, economic duress, commercial impracticability, and violation of the New Mexico antitrust laws. Nowhere in the 24-page complaint or in the 26-page amended complaint was there either factual or legal reference to the foreign government uranium cartel. That was not put in issue though United's officers had known in 1972, three years earlier, that the cartel existed and that Gulf's Canadian subsidiary, Gulf Minerals Canada Limited ("Gulf Canada"), was a participant.

Simultaneously with its first complaint, United filed a set of interrogatories and document requests called its First Set of Interrogatories. These requests also made no mention of the foreign cartel. Though the New Mexico Supreme Court has now construed that set of interrogatories as calling for every document in the possession of every Gulf subsidiary anywhere in the world relating in any way to uranium (which would be a clear abuse of discovery), at the time neither General Atomic nor United interpreted the interrogatories as having anything to do with the cartel. The cartel was first raised by I&M's counterclaim in March of 1977 and United's discovery requests did not mention the cartel until its Second Set of Interrogatories, filed on August 16, 1977.

Almost a year before that request, Canada, reacting to a federal grand jury investigation of the uranium industry, had adopted its Uranium Information Security Regulations. (Section 3, SOR/76-644, as amended by SOR/77-836) (Const. & Stat. App. A-2.) These Regulations prohibit all disclosure of documents or informa-

tion in Canada relating to the cartel. General Atomic, therefore, never had the slightest notion that cartel documents held by a Gulf subsidiary in Canada might be relevant to anything in the case until after Canada had placed those documents beyond reach.

When it became clear that United and I&M proposed to make the cartel an issue, General Atomic attempted unsuccessfully to obtain the Canadian documents and then placed before the Santa Fe judge official representations by the government of Canada which demonstrated that Canadian documents would not be released because Canada regarded judicial examination of its policies to be an intrusion into its sovereignty. (App. U 437a-445a.) Canada also represented that it regulated the price and quantity of all uranium exports, and that the cartel was the creation and the regulatory instrument of foreign governments, including Canada. (App. U 439a-443a.) The state court paid no attention to these facts whatever. On November 18, 1977, the state district court entered an order declaring: "In this forum, the aforesaid laws of this forum which protect the fundamental public policy of this State must govern over the national interest or policy of a foreign country as legislated and conceived by that foreign country." (App. G 292a.)

When the Santa Fe court persisted in requiring production of Canadian documents, the Canadian government, on December 9, 1977, sent to the United States Department of State a Diplomatic Note addressed to the Santa Fe litigation, stating that "[t]he Canadian Government is deeply concerned that an order has been issued by a United States court, the effect of which would be to compel the identification and production of documents in Canada contrary to Canadian law, a result that would be inconsistent with international comity." (App. V 447a-448a.) This Note, which was forwarded to the trial court by the Department of State, also had no effect upon the course of its proceedings. The court continued to demand that General Atomic produce the Canadian documents and then defaulted it for failure to do so.

C. The Foreign Government Uranium Cartel and the Canadian Non-Disclosure Law

Canada's non-disclosure law was part of a more general regulation of uranium which was undertaken in response to actions of the United States.

After World War II, the United States, in urgent need of uranium for military purposes, requested Canada and other allied nations to develop their uranium resources. Canada responded by building an entire industry, including the opening of mines and the creation of towns in remote areas. Eighty-five percent of Canadian uranium exports were to the United States. In 1959, however, in order to protect a growing American uranium industry, the United States stopped purchasing foreign uranium, and, subsequently, it effectively embargoed all such uranium. This elimination of seventy percent of the free world market devastated the uranium industries of Canada, France, South Africa, and Australia. By 1969, the Canadian industry was operating at one-quarter of 1959 production. Canadian jobs, communities, and the existence of the industry itself were threatened. Canada made repeated, though fruitless, diplomatic protests to the United States.

Canada then entered into discussions with the three other producing nations hurt by the American embargo. They agreed to share the world uranium market (excluding only the United States and their own domestic markets) in order to stabilize prices and salvage their uranium industries. This marketing arrangement or governmental cartel lasted from 1972 to 1975. It was part of national regulatory programs which were comprehensive in scope. Indeed, wholly apart from the cartel, these nations, including Canada, independently regulated the price and other terms of the sale of every pound of uranium exported, including sales to the United States.

The relationship of Canada and Canadian uranium producers to the cartel has been made absolutely clear

in official representations to American tribunals.[5] (A representative selection of the many official statements by Canada and the other foreign nations involved concerning their regulation of uranium, the governmental nature of their marketing collaboration or "cartel," and their resentment that American courts should inquire into and impose liability for acts the governments required is set forth in Appendix Y.) Canada had its government-owned corporations join the cartel. It secured participation by private producers as a matter of Canadian national policy. The Canadian government had a range of regulatory tools by which it secured that participation. Among these tools was the government's official power to deny export permits. Such permits are separately required for every export of uranium, and their denial would put a company like Gulf Canada out of business since Canada has only a small domestic market for uranium. Canadian government officials convened and led meetings of Canadian producers regarding the cartel, attended cartel meetings, led the Canadian delegations at these meetings, and specifically implemented and required adherence to the terms of the cartel and the decisions reached at the meetings. *Canada stated to the private producers that export prices and other terms set by the cartel would be enforced upon them by Canadian government regulation.* Thus, the cartel's terms became the minimum that the Canadian government required. Upon one occasion, Canadian officials required export prices higher than those agreed to by the cartel.

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[5] General Atomic and Gulf, here and in the other Uranium Cases, take the position that state and federal courts may not judge the legality of actions taken in foreign countries pursuant to governmental direction. But plaintiffs may show the existence of such regulation, including the cartel, as background and motivation for anticompetitive actions allegedly taken by General Atomic and Gulf in the United States. No foreign government required any such alleged acts, and General Atomic and Gulf claim no immunity with respect to them but rather wish to go to trial to disprove those charges.

When American subpoenas sought production of company records relating to the cartel, all of the nations involved adopted laws or regulations forbidding the removal of those documents from their respective territories and prohibiting the disclosure of their contents. As Canada's Supreme Court stated, these documents reflected the input of Canadian government officials, and Canada regarded their production for U.S. inspection of Canada's policy as a violation of Canadian sovereignty.[6] When the United States convened a grand jury to investigate the cartel, it respected that sovereignty. It did not employ compulsory process to obtain Canadian documents, nor did it attempt to punish any U.S. companies for failure to produce such documents. Rather, the government of the United States confined itself to diplomatic efforts and negotiations, which proved unsuccessful. The Santa Fe court, however, issued compulsory orders requiring the production of the Canadian documents and entered a default judgment when General Atomic was unable to obtain them despite repeated approaches to the Canadian government.

D. The New Mexico Courts' Illegal Interference With General Atomic's Right to Federal Arbitration

The Santa Fe court retained jurisdiction to proceed to a default judgment, as we have noted, by issuing two unconstitutional injunctions that prevented General Atomic from moving the dispute out of that court and into arbitration.

The United-General Atomic 1973 supply agreement contains a clause providing for arbitration of disputes arising under the contract. On March 22 and 23, 1976, General Atomic told United it might implead United in arbitrations brought by utilities owed uranium under contracts made by United and assigned to General Atomic. United informed the Santa Fe court of this on March 24 and sought and received an injunction barring

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[6] *Gulf Oil Corp.* v. *Gulf Canada Ltd.*, —— Can. S.Ct. —— (March 18, 1980) (Slip op. 8, 16, 22-23).

General Atomic from instituting arbitration elsewhere. (App. H 295a-298a.)

General Atomic appealed the injunction to this Court, which, on October 31, 1977, issued a *per curiam* opinion summarily striking it down. *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977). The Court ruled that, under the Supremacy Clause, the injunction was an unconstitutional attempt to bar General Atomic's pursuit of remedies guaranteed by federal law.

General Atomic immediately asked the Santa Fe court to lift its injunction, but United's counsel urged the court to await the formal mandate, saying, "We feel that we need the protection of that injunction more than ever." (Tr. 5/35.) The trial court kept the illegal injunction in effect for four more weeks until receipt of the formal mandate on November 28, 1978. The next day General Atomic demanded federal arbitration. But, at United's request, on December 16 and 27, the Santa Fe court held the right to arbitration now waived, enjoined arbitration once more, and refused to stay its proceedings. (Apps. I-J 299a-319a.) General Atomic appealed to the New Mexico Supreme Court, which did not act, and then filed a petition for a writ of mandamus in this Court. In a summary *per curiam* opinion, this Court stated that it was "inconceivable" the state court should have enjoined arbitration again:

> [T]he Santa Fe court has again done precisely what we held that it lacked power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration.

General Atomic Co. v. *Felter*, 436 U.S. 493, 496 (1978). Despite further attempts and litigation by United to block it, the arbitration eventually went forward pursuant to the provisions of the Federal Arbitration Act. But the Santa Fe court had also proceeded.

E. The Default Judgment

Trial of this case began on October 31, 1977, and was terminated on March 2, 1978, when the Santa Fe court entered a sanctions order and default judgment against General Atomic, stating that General Atomic had exercised "the utmost bad faith in all stages of the discovery process." (App. C 250a.) Despite petitioner's requests, no evidentiary hearing was granted on this issue. The order and the judgments which followed invalidated United's uranium supply contracts with General Atomic, struck all of General Atomic's defenses, counterclaims, and crossclaims, awarded damages to both United and I&M, and granted specific performance of I&M's contract for delivery of five million pounds of uranium from General Atomic. (Apps. C-F 249a-290a.)

F. The Decisions of the New Mexico Supreme Court

The Supreme Court of New Mexico made it clear, despite the Santa Fe court's sweeping language, that the default judgment entered against General Atomic rests squarely upon that company's inability to produce Canadian documents relating to the cartel because of the Canadian Uranium Information Security Regulations. (App. A 12a, 21a.) The Supreme Court of New Mexico conceded that "clearly, the Uranium Information Security Regulations were an act of state." (App. A 69a.) The court held, nevertheless, that no legal doctrine—not act of state, exclusive federal control over foreign relations, or international comity—could deter the Santa Fe court from entering a default judgment for failure to produce the documents that Canada forbade being produced. (App. A 46a-73a.) The court held, further, that neither the denial of a requested evidentiary hearing on the issue of bad faith in discovery nor the exceptional scope of the judgment had denied petitioner due process of law. (App. A 165a-179a.)

In a previous appeal, the New Mexico Supreme Court held that the trial court need not have stayed its proceedings when this Court ruled the trial

court's first injunction unconstitutional and General Atomic demanded arbitration. *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P.2d 290, *cert. denied*, 444 U.S. 911 (1979) (App. B). The New Mexico court simply ignored General Atomic's contention that the trial court lost jurisdiction when it unconstitutionally prevented General Atomic from moving the dispute into arbitration.

Limitations of space require that the salient features of the two opinions, which occupy 248 pages in the Appendix, be dealt with under the various reasons for noting probable jurisdiction.

G. The Arbitration

Subsequent to the lifting of the second unconstitutional injunction a distinguished arbitration panel, composed of former Justice Walter V. Schaefer of the Illinois Supreme Court, former Secretary of Labor Willard Wirtz, and Professor Julian Levi, was convened in San Diego. In the arbitration, United argued that the panel was barred from proceeding by the New Mexico decisions. This contention was dealt with in a Partial Award. With Justice Schaefer and Mr. Wirtz in the majority and Professor Levi dissenting (Apps. K-L 320a-379a), the panel held that "[u]nless judgments of the Supreme Court of the United States are to be treated as meaningless gestures," the "conclusion is inescapable that the Santa Fe Court lacked jurisdiction to proceed after it had unlawfully" enjoined General Atomic from arbitrating. (App. K 345a.) In a Final Award, the same two arbitrators[7] held that United had no case on its claims of fraud, duress, commercial impracticability, and breach of fiduciary duty. (App. M 394a-398a, 405a-407a.) Though they thought arbitration would be barred if antitrust issues

[7] On the last working day prior to arbitration of the merits, United announced it would no longer participate and its arbitrator resigned. (App. M 381a-382a.) The panel proceeded in United's absence pursuant to Rule 30 of the American Arbitration Association Rules. (App. M 383a-384a.)

were intertwined with otherwise arbitrable issues, the arbitrators found that the "facts do not establish a colorable basis for those [antitrust] claims." (App. M 404a.) Moreover, noting that United's executives and attorneys had negotiated a complete release of all claims against Gulf, the panel could "see no reason why [the release] should not be given effect according to its terms." [8] (App. M 404a.)

THE QUESTIONS ARE SUBSTANTIAL

I. Probable Jurisdiction Should Be Noted Because the Decision of the State Court Is Adversely Affecting the Foreign Relations of the United States. The State Court's Assumption of Jurisdiction Raises Important Questions of Federal Constitutional Law as Well as Practical Questions for American Business Abroad.

A. Canada, France, South Africa, Australia, and the United Kingdom have all protested the assumption of jurisdiction over the foreign cartel by American tribunals. Canada, whose regulatory policy is most directly and intimately put in question by the New Mexico courts here, has officially stated that American judicial inquiry into the legality of activities pursuant to the uranium marketing arrangement "would constitute an inappropriate and unwarranted intrusion into Canadian internal affairs." (App. X 505a.) Canada has further stated:

> It is unfortunate but nonetheless true that efforts of American tribunals to exercise jurisdiction over this subject matter have already had an adverse effect on Canadian-American relations. This situation is considered undesirable by both governments. However, the situation does in fact exist and the likelihood of exacerbation is another element against exercise of antitrust jurisdiction.

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[8] The arbitration panel is the only tribunal that has heard and determined this dispute on its merits. Proceedings to confirm and to vacate the awards are now in progress in California and in New Mexico, where the Santa Fe court has vacated the award.

(App. X 508a-509a.) Canada has also stated that "[t]he Government cannot accept a situation in which its ability to ensure compliance by the Canadian private sector with its laws and industrial policies would be undermined." (App. X 491a.)

We submit at the outset, therefore, that it is reason enough to note probable jurisdiction that this "case involves the dignity and rights of a friendly sovereign state . . . ." *Ex parte Peru*, 318 U.S. 578, 586-87 (1943). In *Ex parte Peru* this Court granted an extraordinary writ to take a case from the district court, thus granting an interlocutory appeal as well as bypassing the court of appeals. Here, the judgment of the highest state court is final. If the issue of title to a ship sufficiently involved the dignity and rights of a friendly foreign nation to justify the extraordinary writ in *Ex parte Peru*, we think it *a fortiori* that Canada's repeatedly expressed deep concern over interference by American courts with its right to regulate its own resources justifies review here. For that reason alone, the issues presented here, which Canada believes strike to the heart of her sovereignty, deserve plenary hearing by this Court.

B. Because it involves a conflict between the laws of foreign nations and the laws of the State of New Mexico, this case presents issues of two kinds—practical and legal—that urgently require resolution. The practical issues are of enormous industrial and commercial significance. American corporations must do business abroad as well as at home. They, like Gulf, need to know to what extent they may obey the laws and affirmative policies of foreign nations on foreign soil without falling afoul of American law—in particular, of state and federal antitrust laws. This Court has never addressed that question in the context of detailed foreign regulation of an entire industry.

C. The legal issues are also of critical importance, not only to American foreign relations but to constitutional concepts of separation of powers and federalism. These concepts result in limitations upon state court jurisdic-

tion expressed, respectively, in the act of state doctrine and in the principle of exclusive federal control over the conduct of foreign affairs.

The New Mexico Supreme Court has effectively negated the rule that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory," enunciated in *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). That rule was reaffirmed in *Alfred Dunhill, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976); *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972); and *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964). The New Mexico Supreme Court has also effectively abolished the rule that states may not interfere with foreign policy laid down in cases such as *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *United States* v. *Pink*, 315 U.S. 203 (1942); and *United States* v. *Belmont*, 301 U.S. 324 (1937). This Court should grant plenary review of the New Mexico decision.

(1) This Court should make clear, in answer to a question of fundamental national and international importance, that affirmative regulation by a foreign nation calls into play the doctrines of act of state and exclusive federal control over foreign relations. If these doctrines apply, as we think they undeniably do, New Mexico courts lacked jurisdiction over Canadian uranium regulation, including the cartel, and could not impose sanctions for General Atomic's inability to produce the Canadian documents. Jurisdiction is denied an American court when the actions in question were required by a foreign nation acting within the sphere of its sovereignty. That test is certainly met by Canada's pervasive, transaction-by-transaction regulation of uranium export prices and terms, and by its protection of the confidentiality of that regulation with criminal sanctions. The Supreme Court of New Mexico has cast such doubt upon this principle, whose application in the modern international commercial world is crucial, that this Court

should note probable jurisdiction to clarify this area of law.

(2) By applying its state antitrust law, the New Mexico Supreme Court created two serious anomalies in American law that require resolution by this Court. The first is that while a state or even a city may regulate and so create antitrust immunities, *see California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Community Communications Co.* v. *City of Boulder*, 630 F.2d 704 (10th Cir. 1980), a foreign nation may not. *Midcal* held regulated conduct immune from antitrust challenge when two conditions are met: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." (445 U.S. at 105.) Under this test, the conduct required by Canadian regulation is clearly immunized from judicial scrutiny. It is inconceivable that a foreign nation should have less freedom to regulate, free of interference from New Mexico's antitrust law, than the freedom given states and cities to regulate without interference from federal antitrust law.

The second anomaly is that United States regulation much less affirmative and less actively supervised than Canada's has been held to confer immunity from the American antitrust laws. *See Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975). American antitrust law, whether federal or state, can hardly require more of Canadian regulation than it does of American regulation.

(3) The New Mexico Supreme Court attempted to avoid the full force of constitutional restrictions upon the exercise of state court jurisdiction by means which, in and of themselves, give rise to substantial federal questions.

(a) The New Mexico courts refused to give credence to official representations of the government of

Canada. Those courts had before them, but ignored, representations by Canada that it regulated the price and other terms of all uranium exports. (Apps. Q-X 430a-512a.) The New Mexico Supreme Court actually refused to accept Canadian government briefs—reviewed and approved at the ministerial level of the Canadian government—that made it clear again that the setting of export prices and terms for Canadian uranium was an act of state and that Canada *required* all Canadian producers to comply with the cartel's price and quota provisions.[9] (Apps. Q-T 430a-436a; App. X 491a; Apps. X-Y 489a-560a.) The court claimed instead that Canada had said only that it "participated" in the cartel and that an act of state defense was not available when a foreign government merely "approved, authorized, tolerated, encouraged, aided, or participated" in the questioned actions. (App. A 48a, 49a.) Having misrepresented Canada's declarations about its own policies, the court stated that, in any event, there was conflicting evidence about that policy, that the courts needed to try the issue, but that such a trial was made impossible by the lack of cartel discovery. (App. A 49a-54a.) Thus, the state court assumed the power to try the actions and credibility of a foreign government. There could be no greater interference with foreign relations than such a trial. It is for this reason that *Zschernig* v. *Miller*, 389 U.S. 429 (1968), precludes state court inquiries into the credibility of foreign governments. This Court should resolve the question of what respect a state or federal court must give to representations by a foreign government such as were made here.

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[9] This refusal to accept a foreign government's briefs, which were approved at Canada's ministerial level, coupled with the fact that these briefs are being ignored in other Uranium Cases, indicates that this Court's direction to the Solicitor General that foreign nations make their positions known directly to courts through briefs, rather than by diplomatic notes to the State Department, is having just the opposite result from that intended. This situation, which has serious consequences for American foreign relations, requires correction by this Court.

(b) The New Mexico Supreme Court demanded detailed information with respect to all actions of Canada and the cartel, and the situs of all such actions. (App. A 50a-51a.) If this requirement is the rule, something akin to answers to detailed antitrust interrogatories and, perhaps, testimony by foreign government officials, subject to cross-examination, must be provided. No foreign nation would or should demean itself by surrendering its sovereignty in this way. If New Mexico's demands are justified, foreign government representations in the traditional form are now unavailing. Any court, state or federal, could circumvent constitutional limitations upon its jurisdiction in the foreign policy area by demanding transaction-by-transaction information about complex regulatory programs that no foreign nation will provide.

(c) The Supreme Court of New Mexico held plaintiff had a right to examine the Canadian documents to see if there might be evidence of illegal acts by General Atomic and Gulf in the United States—acts not within Canadian regulation and not claimed to be by either Canada or appellant. (App. A 50a-54a.) If New Mexico is correct, no nation may keep its governmental processes and policies from being subjected to the scrutiny of American courts when any documents reflecting those processes and policies are in the private hands of its citizens. Or, at least, no nation may do so and expect multi-national corporations to obey the nation's laws on its own soil. Since plaintiffs in American courts could routinely obtain default judgments by asking for foreign documents, the sovereignty of the foreign nation is severely diminished and its relations with the United States damaged, as Canada has declared its relations with the United States have been. No result could more thoroughly undercut the basis for the constitutional doctrines under discussion.

(d) The New Mexico Court also ruled that the act of state doctrine did not apply to the Uranium Information Security Regulations, which it had previously held to be an act of state. (App. A 69a-70a.) The basis

for this remarkable ruling was that in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958), this Court did not refer to the act of state doctrine in upholding a court's right to order production of documents unavailable under Swiss non-disclosure law. If the New Mexico Court is correct, any party who obeys a foreign law which protects the confidentiality of foreign governmental acts is subject to default. If *Societe Internationale* stands for that extraordinary proposition, both American business and foreign governments ought to know it now.[10]

(e) The New Mexico Supreme Court held the act of state doctrine inapplicable to this case under the *"Bernstein"* exception (*Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954)), which permits a federal court to exercise jurisdiction if advised by the Executive that there will be no interference with foreign affairs. The New Mexico courts have never been so advised. The New Mexico Supreme Court, however, invented the wholly original doctrine that the *"Bernstein"* exception is satisfied by the facts that the Executive took no position in this litigation, that the Department of Justice filed a criminal information against Gulf on a limited aspect of the total case involved here,[11] and

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[10] Though it admitted that the Canadian non-disclosure Regulations constitute an act of state (App. A 69a), the New Mexico Supreme Court, incredibly enough, said the act of state doctrine was not violated by the order to produce the Canadian documents because that order did not direct anybody actually to violate the Regulations (App. A 69a-70a). That is sheer sophistry. Nobody was ordered to violate Canadian law; General Atomic was merely amerced between 500 million and one billion dollars for not procuring such a violation.

[11] The action of the Executive Branch, which is responsible for foreign relations, stands in strong contrast to the actions of the New Mexico courts. The Department of Justice sought no sanctions for the inability to produce Canadian documents and limited its enforcement action because of foreign policy considerations. (Hearings on Confirmation of John H. Shenefield, Nominee, Associate Attorney General, Before the Senate Committee on the Judiciary, 96th Cong., 1st & 2d Sess. 8-16, 70-78 (Dec. 7, 1979 and Jan. 24, 1980) (Testimony of Mr. Shenefield). The New Mexico courts,

a congressional subcommittee held hearings on the cartel. (App. A 61a-64a.)

If the *"Bernstein"* exception is still viable after its explicit rejection by six Justices of this Court in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), if the *"Bernstein"* exception may be used to confer jurisdiction upon state courts, thus providing an exception to *Zschernig* v. *Miller*, 389 U.S. 429 (1968),[12] and if *"Bernstein"* can be satisfied by facts which plainly do not constitute an Executive declaration that the court may proceed, those principles should be announced by this Court in this case so that the Executive and the courts understand the radical change that has occurred in fundamental law.

D. The controlling constitutional principles of the act of state doctrine and the rule of *Zschernig* v. *Miller* cannot be escaped by the state court's assertion that as a factual matter General Atomic displayed bad faith in discovery. That assertion necessarily rests upon the legal theories the court propounded to justify the assertion of jurisdiction despite the act of state doctrine and the *Zschernig* line of cases. As the New Mexico Supreme Court *conceded*, if the state courts lacked jurisdiction because of the constitutional principles of separation of powers and the distribution of functions under federalism, the question of discovery does not even arise. (App. A 18a.) Secondly, if Canada has a sovereign right to prevent the courts of other nations from inquiring into its governmental actions, the same constitutional princi-

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however, imposed the ultimate sanction for inability to produce Canadian documents and neither could nor did limit in any way the case alleged by a private plaintiff. If there were some form of *"Bernstein"* exception to be implied from the Department's action, the state court could certainly not go further than the federal Executive had.

[12] In *Zschernig*, this Court held that the state court lacked jurisdiction despite an *amicus* brief by the United States saying that the application of the state law in that case did not interfere with foreign relations.

ples would prevent punishment of General Atomic for inability to procure the information Canada had a right to protect. The inadequacy of the state court's findings of bad faith is shown at pp. 29-30, *infra*. Here, we merely point out that those findings in no way affect the desirability that this Court review and resolve the important legal issues and uncertainties raised by the judgment below.

II. Probable Jurisdiction Should Be Noted to Determine Whether a State Court Can Retain Jurisdiction to Proceed to Judgment by Unconstitutionally Enjoining a Defendant from Exercising Its Federally Guaranteed Right of Access to Another Tribunal.

The New Mexico Supreme Court never addressed appellant's argument that the Santa Fe trial court lost jurisdiction when it unconstitutionally enjoined General Atomic from choosing arbitration rather than trial in Santa Fe. This retention of jurisdiction by the Santa Fe court conflicts with decisions of this Court that jurisdiction is lost when removal to another tribunal is wrongfully denied. It also conflicts with the decisions of three federal courts of appeals that jurisdiction is lost when arbitration is wrongfully denied.

The 1973 supply agreement, which covers just over 24 million pounds of uranium, or almost 90 per cent of the uranium at stake in this case, contains a clause providing for arbitration. When General Atomic first mentioned the possibility of arbitration, United obtained from the Santa Fe court an injunction prohibiting General Atomic from arbitrating. (App. H 295a-298a.) General Atomic appealed all the way to this Court, which held summarily that the injunction conflicted with the Supremacy Clause and *Donovan* v. *Dallas*, 377 U.S. 408 (1964). *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977). General Atomic at once asked the Santa Fe court to lift its injunction, but the trial court kept it in effect for another month until the formal mandate of the New Mexico Supreme Court came down. General Atomic immediately

demanded arbitration pursuant to the Federal Arbitration Act, but, at United's request, the Santa Fe court held that General Atomic had waived its right to arbitration, refused to stay its proceedings, and once more enjoined General Atomic from arbitrating. (Apps. I-J 299a-319a.) When the Supreme Court of New Mexico did not act, General Atomic again came to this Court. In a summary *per curiam* opinion, this Court held the issuance of the new injunction "inconceivable" in view of the Court's earlier decision, but withheld the writ of mandamus in the expectation that the Santa Fe court would lift its prohibition. *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978).

The upshot of this lawless behavior by the New Mexico courts was that General Atomic was blocked from proceeding under the Federal Arbitration Act from April 2, 1976, to May 30, 1978, a period of 26 months. During that period, the Santa Fe court forced General Atomic to litigate in its jurisdiction, entered an extraordinary discovery order requiring General Atomic to produce documents from a non-party located in Canada and subject to Canadian law, and then defaulted General Atomic for failure to produce. Without its two unconstitutional injunctions, the state court could not have held General Atomic in New Mexico so as to achieve this result. The unconstitutional injunctions were the foundation upon which its retention of jurisdiction and all else rested.

It is firmly established that when a court illegally prevents a party from going to another tribunal to which the party has a right of access, the court loses jurisdiction and its further proceedings are without authority and void. This Court has held that a state court which wrongfully denies removal to a federal court loses jurisdiction. *Gordon* v. *Longest*, 41 U.S. (16 Pet.) 97, 104 (1842). Similarly, when a case is improperly removed, the federal court proceedings thereafter are a nullity. *Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454, 464 (1894); *American Fire & Casualty Co.* v. *Finn*, 341 U.S.

6, 17-19 (1951). See *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963).

Federal courts of appeals have specifically applied this general rule to courts which have wrongfully denied arbitration. *Sibley* v. *Tandy Corp.*, 543 F.2d 540 (1976), *rehearing denied*, 547 F.2d 286 (5th Cir.) *cert. denied*, 434 U.S. 824 (1977); *Controlled Sanitation Corp.* v. *District 128*, 524 F.2d 1324 (3d Cir. 1975), *cert. denied*, 424 U.S. 915 (1976); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3d Cir. 1948); *Germany* v. *River Terminal Railway*, 477 F.2d 546 (6th Cir. 1973).[13]

The New Mexico Supreme Court also attempted to justify the denial of arbitration on the theory that questions of New Mexico antitrust law are not arbitrable and, since those questions are intertwined with other issues, nothing in the case is arbitrable. That holding is not merely erroneous but, in itself, merits review by this Court. Quite aside from the fact that the arbitration panel, the only tribunal to reach the merits of this case, found that United's antitrust claims had not even a "colorable basis," the New Mexico court's rationale would destroy the policy and utility of the Federal Arbitration Act. Any antitrust allegation would render the total dispute unarbitrable, and that tactic would be routinely employed by parties resisting arbitration. Here, for example, by using that tactic United was able to avoid arbitration of arbitrable issues which could eliminate the

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[13] In addition to the direct conflict between the New Mexico Supreme Court, on the one hand, and this Court and the Third, Fifth, and Sixth Circuits, on the other, there is a direct conflict with the decision of the federal arbitration panel majority (former Chief Justice Walter Schaefer and former Secretary of Labor Willard Wirtz) which held that the Santa Fe court had lost jurisdiction and that its proceedings were *coram non judice*. (App. K 340a-345a.) The arbitration panel also rejected the contention that General Atomic had waived its right to arbitration, holding that General Atomic could not make any further move to arbitration while enjoined without inviting contempt proceedings and that General Atomic moved immediately to invoke its right to arbitration once the barrier imposed by the state court was removed. (App. K 345a-352a.)

need for any antitrust trial on the 1973 supply agreement.[14] The New Mexico Supreme Court's decision thus conflicts with the paramount federal law enunciated in *Sibley* v. *Tandy Corp., supra,* which held that contract claims must be arbitrated before nonarbitrable securities claims were litigated in court. The Fifth Circuit reversed the district court's judgment, thus nullifying a trial, and based its result both on "the policy behind the United States Arbitration Act and considerations of judicial economy. . . ." (*Id.* at 544.)

III. Probable Jurisdiction Should Be Noted Because the State Court's Default Judgment Raises Important Questions of Due Process.

The New Mexico Supreme Court's approval of a complete default judgment rests upon a radically different conception of due process than, and conflicts directly with, this Court's decision in *Societe Internationale* v. *Rogers,* 357 U.S. 197 (1958).

In *Societe* this Court reviewed the dismissal of a complaint, with prejudice, for plaintiff's failure to make complete discovery because documents were unavailable due to Swiss non-disclosure laws. This Court held that the requirement of due process of law establishes "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." (357 U.S. at 209.) The limitations were held particularly applicable where, as here, the sanc-

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[14] If United prevailed on arbitrable issues of fraud, duress, or commercial impracticability, there would be no need to reach its antitrust claims regarding the 1973 contract. On the other side, General Atomic might have prevailed as to the release given by United or on its contention that United had suffered no injury because the 1973 agreement merely replaced United's prior commitments of the same uranium to utility companies. Thus, the arbitration General Atomic sought could have dramatically reduced the size of, if not totally eliminated the need for, an antitrust trial.

tion is entered against a party with the status of a defendant. (*Id.* at 210-11.)

The default judgment entered here raises vital due process issues in three respects: A. the court's refusal to determine whether the parties seeking the Canadian documents were disadvantaged in any way and to what degree by their unavailability; B. the entry of a default on issues as to which the unavailable documents have no conceivable relevance; and C. the court improperly denied an evidentiary hearing on the issue of bad faith in discovery, which is particularly egregious since the finding of bad faith is wholly unsupportable.

A. The denial of due process is made patent by the fact that no effort whatever was made to determine whether United and I&M had been disadvantaged in any way and, if so, to what extent and on what issues. United alleged, for example, that General Atomic had contracted for United's uranium in an effort to monopolize United States supplies, and that there might be documents in Canada showing such acts (though Canada held the documents only because they related to its regulation of uranium). Had there been a trial, General Atomic would have shown that Gulf's ownership of supplies was so small a fraction of the United States total, and that Gulf's purchasing policy was so entirely linked to its uranium sales commitments, that there was not the remotest possibility of monopolization. These facts are so clear and dispositive that they could not have been overcome by any permissible inferences concerning the contents of the Canadian documents. Thus, it cannot be presumed that United was disadvantaged by the unavailability of the documents. For the state courts to refuse to go forward to determine the existence or absence of disadvantage is to deprive General Atomic of its property without due process of law.

The New Mexico court's refusal to hold a trial at which disadvantage was determined is contrary to the holding in *Societe.* Writing for a unanimous Court, Jus-

tice Harlan held that, despite the unavailability of some Swiss documents, trial was to proceed though "[i]t may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events. . . . But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits." (357 U.S. at 213.) If *Societe* remains good law, the judgment below is a denial of due process. That question, of increasing general importance as foreign nations resist attempts of American courts and litigants to question the bases of national regulatory policies, requires definitive resolution by this Court.

B. The New Mexico Supreme Court also violated due process by upholding a default, based upon the unavailability of documents, as to potentially dispositive issues on which the missing documents had no conceivable relevance. (App. A 172a, 175a.) Thus, General Atomic contended that United, in entering the 1973 supply agreement, with knowledge of the cartel, had given a complete release of its right to sue for any misconduct culminating in the agreement and had thereafter ratified that release. General Atomic also contended that United could have suffered no damage from signing contracts with General Atomic, since the 1973 agreement merely required United to supply uranium it had committed to the utilities long before the cartel, and the 1974 agreement involved uranium United had placed on the market for commitment no matter who the purchaser might be. These and other legal issues could not have been affected by the unavailable documents.

The across-the-board default judgment, therefore, was not justified by permissible inferences but was "mere punishment" in violation of the requirements of due process as enunciated in *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958); *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909); and *Hovey* v. *Elliott*, 167 U.S. 409 (1897). The proper use of an across-the-board sanc-

tion is illustrated by *National Hockey League* v. *Metropolitan Hockey Club Inc.*, 427 U.S. 639 (1976), where plaintiff's complaint was dismissed for repeated failures to make discovery as to damage issues which controlled the entire case. This Court should resolve the question of whether default can extend to issues and defenses in no way implicated by the alleged failure to make discovery.

C. Despite General Atomic's requests, and despite the fact that seven lawyers for General Atomic filed affidavits stating that they acted in good faith, with no intent to conceal the cartel, and had not believed the cartel to be an issue, the courts below held that no evidentiary hearing was required to resolve these factual issues. (App. A 167a-171a.) But where the deprivation at stake is as serious as a default—with its concomitant loss of property and access to the courts—there is a right to an evidentiary hearing on the dispositive facts. *Memphis Light, Gas, & Water Division* v. *Craft*, 436 U.S. 1 (1978); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 269-70 (1970); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 103 (1963); *Greene* v. *McElroy*, 360 U.S. 474, 496-97 (1959).

Moreover, the purported finding of bad faith is not supportable and was a patent attempt to avoid the substance of *Societe*. When the issue of the cartel was introduced into this case, General Atomic made repeated attempts to secure waivers of the Canadian Uranium Information Security Regulations. These were unsuccessful. General Atomic offered to try any other method that either the Santa Fe court or opposing parties could suggest. No suggestions were forthcoming. General Atomic scheduled a meeting with the appropriate Canadian officials and asked the trial judge and opposing parties to attend to help get the documents. The trial judge and opposing parties refused. Other parties, in-

cluding Gulf, Westinghouse, and the Department of Justice have attempted in the Uranium Cases to obtain Canadian and other foreign documents—by requests for waivers, by subpoenas, by letters rogatory, by litigation in Canada up to that nation's Supreme Court, and by diplomatic negotiations. Every effort has failed. Indeed, the New Mexico Supreme Court concedes that Canada's policy is firm and that there is absolutely no way the Canadian documents can be obtained. (App. A 146a, 153a and n.125.) Yet, that court finds that General Atomic's efforts were inadequate, that it is therefore in bad faith, and that it may be completely defaulted.

The injustice is patent. Despite extensive efforts, and despite the New Mexico court's admission that no efforts would have succeeded, General Atomic has been punished by being deprived of commercial rights worth between 500 million and one billion dollars.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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CONSTITUTIONAL AND STATUTORY APPENDIX

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. COMMERCE CLAUSE

Article I, Section 8, Clause 3 of the United States Constitution provides in pertinent part:

> The Congress shall have Power . . . [t]o regulate commerce with foreign Nations, and among the several States . . . .

B. TREATY AND APPOINTMENT POWER

Article II, Section 2, Clause 2 of the United States Constitution provides in pertinent part:

> [The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . .

C. SUPREMACY CLAUSE

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

D. FOURTEENTH AMENDMENT

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . .

E. FEDERAL ARBITRATION ACT

9 U.S.C. §§ 2, 3 (1976) provide:

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

F. CANADIAN URANIUM INFORMATION SECURITY REGULATIONS

Section 3, SOR/76-644, as amended by SOR/77-836, promulgated pursuant to Section 9 of the Atomic Energy Control Act, R.S.C. 1970, c. A-19 provides:

3. No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person in relation to the exporting from Canada or marketing for use outside Canada of uranium or its derivatives or compounds shall

(a) release any such note, document or material or disclose or communicate the contents thereof to any person, foreign government or branch or agency thereof or to any foreign tribunal unless

(i) he is required to do so by or under a law of Canada, or

(ii) he does so with the consent of the Minister of Energy, Mines and Resources; or

(b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.

G. NEW MEXICO ANTITRUST ACT

Sections 49-1-1 to 49-1-3 N.M.S.A. (1953) (revised in 1979) provide in pertinent part:

49-1-1. Contracts and combinations in restraint of trade declared illegal—Penalty for participation. Every contract or combination between individuals, associations or corporations, having for its object or which shall operate to restrict trade or commerce or control the quantity, price or exchange of any article of manufacture or product of the soil or mine, is hereby declared to be illegal.

* * * *

49-1-2. Monopolies—Penalty. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce of this state, shall be deemed guilty of a misdemeanor . . . .

49-1-3. Contracts for restraint of trade or monopoly void—civil liability of participants—Commodity purchasers relieved from payment. All contracts and agreements in violation of the foregoing two [2] sections [49-1-1, 49-1-2] shall be void, and the person or persons, corporation or corporations, association or associations who shall violate the provisions of either of said sections shall be civilly liable to the party injured for any and all damage occasioned by such violation, and any purchaser of any commodity from any individual, corporation or association transacting business in violation of such sections shall not be liable for the payment for such commodity.

H. NEW MEXICO RULE OF CIVIL PROCEDURE

Rule 37(b)(2) of the New Mexico Rules of Civil Procedure (1978) (amended in 1979) provides:

Rule 37. Refusal to Make Discovery—Consequences.

* * * *

(b) Failure To Comply With Order.

* * * *

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying or photographing or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.